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In The

Supreme Court of the United States

October Term, 1975

No. 75-121

THOMAS JULIA, JR.,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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In The

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No. 75-

THOMAS JULIA, JR.,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT

Petitioner respectfully seeks a writ of certiorari to the New York Court of Appeals from the order of that Court rendered the 30th day of April, 1975,[1] affirming without opinion the order of the Appellate Division of the Supreme Court of the State of New York, Second Department, rendered the 9th day of October, 1973, which in turn had affirmed without opinion the judgment of the Supreme Court, Kings County, convicting him,

1. The Court of Appeals number was 156.

upon his plea of guilty, of the crime of grand larceny second degree. This judgment also affirmed another order of the Supreme Court, Kings County, denying *coram nobis* relief.[2]

JURISDICTION

The jurisdiction of this Court is predicated upon 28 U.S.C. §1257(3). The Court of Appeals of the State of New York rendered its decision affirming the judgment of conviction on the 30th day of April, 1975.

OPINION BELOW

There was no written opinion by either the Appellate Division or the Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth, Sixth and Fourteenth Amendments of the United States Constitution are herein involved.

QUESTIONS PRESENTED

1. Whether petitioner was accorded due process in the Trial Court in connection with his sentence in view of the fact that a stranger to the proceeding was permitted to make uncorroborated and unfounded vituperative remarks concerning the petitioner, to which no response was permitted? (Fifth and Fourteenth Amendments.)

2. The indictment number herein was 1970/1968.

2. Whether petitioner's right of confrontation was denied in violation of the Sixth and Fourteenth Amendments of the United States Constitution, by virtue of his inability to confront an unknown accuser who made vituperative and unfounded remarks at the time of his sentence, disparaging his character and demanding punishment?

3. Whether a plea bargain was broken when the Court imposed jail time after the Trial Judge had told petitioner, in the presence of his lawyer, that he would not be incarcerated if he pleaded guilty and agreed to make restitution? (Fifth and Fourteenth Amendments; *Santobello v. New York*, 404 U.S. 257.)

4. Whether petitioner's Fifth, Sixth and Fourteenth Amendment rights to call witnesses in his behalf and to a fair trial were violated when the *coram nobis* Court, refused to permit him to call witnesses in Court, including a Catholic priest, a former Foreign Service officer with the United States Department, and so forth, who would have corroborated Julia's statement that he had been promised no incarceration if he pleaded guilty?

ESSENTIAL FACTS

The petitioner herein was indicted in a thirty-count indictment, charged with various crimes, but ultimately pleaded guilty to the charge of grand larceny second degree after a prior trial had ended in a mistrial.

The petitioner was originally sentenced before Judge Irwin Brownstein, but received a 2½ to 5 year sentence instead of what

he expected would be a probationary term without incarceration.

Julia is afflicted with claustrophobia.

At the time of sentence, the Court was confronted by a proceeding so bizarre that only by reading the contents thereof, can one actually conceive of the incidents which actually occurred.

The Court apparently permitted complete strangers to the proceeding to interlope into the sentencing procedure and articulate what amounted to threats or intimidation in order to obtain sterner punishment for the defendant.

The Court allowed an attorney for the alleged victim to make statements to the Court, which were neither under oath, nor subject to cross-examination. The defense counsel, Mr. Washor stated in open Court that pressure was being put on the Court to impose a stiff sentence.

A Mr. Irving Haberman, who stated that he was with "CBS News", interrupted the proceedings, and declared that the petitioner was a "punk" and that he had "ruined the life of my sister, *killed* my brother-in-law, who died in the hospital as a result of this."

Mr. Haberman continued:

> "I didn't know it was happening, and when it did, when I heard about it, I brought the full

forces of the District Attorney's office to bear to apprehend him . . . .

THE COURT: Have you talked to the District Attorney since this man pleaded guilty? Have you talked to the District Attorney or any representative of the District Attorney's? . . .

MR. HABERMAN: I just asked the District Attorney for one thing.

THE COURT: What was that?

MR. HABERMAN: I said I had heard that there might be some *hanky-panky* because he pleaded guilty after having a mistrial and I asked the District Attorney's office . . . .

THE COURT: *Hanky-panky*, in the District Attorney's office? Explain.

MR. HABERMAN: I spoke to MR. GOLD in his office, that I heard some stories that there might be some *hanky-panky*.

THE COURT: Where?

MR. HABERMAN: Between the Lawyer and the Court . . . ."[3]

3. Neither petitioner nor anyone else so far as we know has accused the District Attorney's office of anything. On the contrary, he has indicated a completely impartial position.

Mr. Haberman went on to state that he felt that there was some hanky-panky between the Court and counsel, whereby the defendant was seeking a light sentence.

Mr. Haberman, a complete stranger to the proceedings, and apparently not even a member of the bar, was permitted to tell the Court that the defendant was a "*punk*"; that he had ruined the life of his sister; and had "killed" his brother-in-law.

Whether or not the witness, Haberman, who was not sworn, was speaking figuratively or literally, one cannot tell. The fact remains that he was allowed to make unsubstantiated accusations, without the benefit of being sworn, and certainly without the right of cross-examination or confrontation.

THE *CORAM NOBIS* PROCEEDING

At the *coram nobis* hearing, before Justice Rinaldi, the Court forbade any testimony concerning the petitioner's state of mind at the time that he took a plea of guilty. As a matter of fact, the Court below (Justice Rinaldi) would not even permit a record to be made of what particular witnesses for the petitioner wished to say.

The Court was told, at the time of the hearing on the *coram nobis* proceeding, that there were several witnesses including a Catholic priest, who could corroborate the petitioner's state of mind, that his lawyer told him that he would not go to jail, if he pleaded guilty. Some of these witnesses indicated that Mr. Washor had spoken to the Judge confirming the promise. Under the circumstances, it is respectfully submitted that the Court

should have, at least, permitted these witnesses to testify, since they were certainly relevant and admissible, on the question of whether or not the petitioner believed that he, in fact, had received a promise that he would not receive a jail sentence if he pleaded guilty.

The people conceded that if the petitioner's physician testified, he would confirm the fact that Thomas Julia, Jr., the petitioner herein, suffered from *claustrophobia.*[4]

It should also be noted that Justice Brownstein, when he testified at the *coram nobis* proceeding, admitted that he had seen the petitioner in chambers and that he had discussed the possibility of restitution, but denied that he specifically made any promises with respect to sentence. There is no doubt however, that a conversation did take place. Moreover, the Justice admitted that he saw the petitioner in the absence of the District Attorney (74).

Justice Brownstein, quite commendably, acknowledged that there had been a discussion with respect to restitution and that restitution could only be ordered if a defendant were on probation.

The Justice continued, explaining that he does not ordinarily like to see defendants in the absence of the District Attorney, but since the prosecutor had already gone out and the plea had been agreed upon, Justice Brownstein said that he

4. It is very significant to note, that even at the time of sentence, the petitioner told the Court that he suffered from claustrophobia and that he had been under psychiatric treatment for 18 years and that he was dreadfully afraid of being incarcerated for that reason.

decided to see the petitioner in the absence of the District Attorney "... if it would help dispose of the case. The defendant was brought in by MR. WASHOR .... I explained to him there is no promise in the case."

There was no doubt whatsoever, however, that there had been a discussion about restitution and that it had been explained to the petitioner that "*restitution can't be ordered if a man is in jail. Restitution can only be ordered as a condition of probation.*"

Moreover, the Justice declared that he told the petitioner that he was not making any promises, and that Julia would be asked that question at the time of sentence and would be expected to answer that there had been no promises.

It seems extremely odd that a justice should go out of his way to mention to a defendant that he must articulate the fact that no promises were made. One would think that the attorney for the defendant would make that statement, but certainly not the presiding Justice.

Justice Brownstein, quite frankly, admitted that he frequently engages in plea-bargaining and that he often makes promises with respect to what maximum sentence would be (80, 81).

The trial attorney, Michael Washor, testifying for the People, stated that there were conversations among himself, Justice Brownstein and the petitioner, where a possibility of restitution was discussed (99, 100). Washor, however, said he did

not recall the judge ever promising that petitioner would not go to jail, but rather said it would depend upon the probation report.

Counsellor Washor declared that he had previously represented the petitioner in a trial of the case in which the plea of guilty was ultimately taken, and that case had ended in a mistrial (105).

The plea of guilty in this case was taken on the 13th of November, 1969, and Washor admitted that he had had several conversations with the petitioner prior thereto.

Mr. Washor also conceded that there had been conversations with the petitioner, Justice Brownstein, and himself, when the probation and restitution had been discussed (112, 113).

> "Q. Did Justice Brownstein, in his discussions with the defendant, Julia and yourself, indicate that there was at least a possibility that this defendant would not go to jail if he took a plea of guilty? A. I guess I would have to answer that affirmatively if you take into consideration the discussion of the restitution. Of course that is what it meant."

Mr. Washor further explained that there were discussions between himself and the petitioner concerning what restitution meant. Washor declared that the petitioner, Julia, was under the impression that if he, in fact, *offered some restitution, he*

couldn't go to jail irrespective of what Justice Brownstein might want to do. Washor testified therefore as follows:

> "A. Not after he (JULIA) discussed it with me and JUSTICE BROWNSTEIN, he seemed to me to understand that if he made restitution no matter what JUSTICE BROWNSTEIN wanted to do, *he couldn't go to jail.*
>
> Q. *He couldn't go?* A. *No, Sir.* If he came up with money and paid this woman back a portion of money, if Judge BROWNSTEIN wanted to send him to jail, I was under the impression that he understood that *he couldn't even do it. This is what I led him to believe"* (116, 117). (Emphasis ours.)

Mr. Washor declared further that his client did want to make restitution (118).

Mr. Washor declared that the affidavits submitted by the petitioner from several people, including a Catholic *priest,* were apparently *untrue* (124, 125).

Justice Rinaldi refused to permit the witness, Washor, to answer whether he had any conversations concerning promises made by Justice Brownstein to Mrs. Julia (Carol Lee Julia) (124).

The colloquy between Justice Rinaldi and defense counsel, pages 125 through 127 of the hearing minutes, indicated that

Justice Rinaldi would not permit probing of whether or not promises had, in fact, been made by Justice Brownstein to be communicated via Mr. Washor.

The hearing Judge, Justice Rinaldi, refused to accept the tape recording of a conversation between prospective witnesses and Mr. Washor concerning the alleged promises.

The original sentence was reversed in the Appellate Division with directions that a new sentence was to be imposed.

Upon resentence, another Judge, Judge Corso, imposed the same sentence but refused to hold a hearing or to permit the witnesses whom Justice Rinaldi had kept off the stand, to testify.

Both the Appellate Division and the Court of Appeals affirmed that judgment.

REASONS FOR GRANTING THE WRIT

I.

The petitioner was deprived of due process of law as well as the Sixth Amendment right to confront witnesses against him by virtue of the fact that a stranger to the proceeding (Mr. Haberman) was permitted to make vituperative and disparaging remarks and also request punishment, without affording petitioner an opportunity to confront this witness.

As the facts indicate, the petitioner was arraigned for sentence, at which time a complete stranger to the proceeding

was able, in essence, to intimidate the Court by making accusations of "hanky-panky" and referring to the defendant as "a punk" and as someone who "has . . . ruined the life of my sister, killed my brother-in-law who died . . . ." and then further stated ". . . I heard some stories that there might be some hanky-panky."

When the Trial Judge, Justice Brownstein, asked "Where?," Mr. Haberman menacingly responded "Between the lawyer and the court."

The *coram nobis* proceeding before Justice Rinaldi was virtually a mockery of justice since Julia was not permitted to call witnesses whom he had in the courtroom, including a Catholic priest, a former member of the United States Foreign Service, and others, who would have corroborated his state of mind that he was not going to jail when he pleaded guilty.

More than this, however, was the fact that the unfounded and uncorroborated accusations of Mr. Haberman, who also said he was with "CBS News," could not have failed to have had some effect upon the Judge trying the case and pronouncing sentence.

Petitioner was not permitted to confront Haberman on these charges and, of course, denies their accuracy completely. This violated the Sixth and Fourteenth Amendments of the United States Constitution. See also, *Smith v. Illinois*, 390 U.S. 129; *Alford v. United States*, 282 U.S. 267; *Douglas v. Alabama*, 380 U.S. 415; and, *Poller v. CBS*, 386 U.S. 464, 473.

We might also point out that the remarks of Haberman completely tainted the sentencing procedures and no inquiry has ever been made, so far as we know, into these accusations, nor has any opportunity been afforded to Julia to confront Haberman.

The sentence procedure which beclouds proper sentencing considerations is a deprivation of due process of law.

See *Williams v. New York*, 337 U.S. 241; *Townsend v. Burke*, 334 U.S. 736 and *Armprister v. United States*, 256 F.2d 294 (C.A. 4); and *Pointer v. Texas*, 384 U.S. 400, 30 Albany L. Rev. 151.

In *Williams v. New York, supra*, Justice Murphy felt that a probation report which contained matter which would clearly not be admissable at a trial, and was "not subject to examination by defendant . . . ." violated "the high commands of due process . . ." (337 U.S. 249-250; 253).

In *Townsend v. Burke, supra*, the Supreme Court likewise had held that a sentence based on materially false statements without opportunity by defense counsel to correct them, not only constituted denial of due process, *but, moreover, a denial of counsel*, because counsel is powerless to correct errors of which he is unaware. *Pointer v. Texas, supra*, is in a similar vein. (See, *Willis v. Hunter*, 166 F.2d 721, 723 (10 Cir.), *cert. denied*, 334 U.S. 848 (1948).)

In 199 U.S. Code, Cong. Admins. News, 967, 968, Justice Douglas indicated that inaccuracy in a pre-sentence report is "a flaw which may be of constitutional dimension" and that it

ought not be a rule that a Judge may impose sentence on the basis of information of which the defendant may be unaware and to which he has not been afforded an opportunity to reply.

Such a procedure is almost tantamount to a Bill of Pains and Penalties in violation of the Bill of Attainder provisions of the United States Constitution (Article I, Sections 8, 9, United States Constitution).

See *United States v. Lovett,* 328 U.S. 303, 322; *Drehman v. Stifle,* 8 Wall. 595, 601; 16A. C.J.S. Const. Law, §§452, 455 and *Cummings v. Missouri,* 4 Wall. 277, 320 (1866).

II.

The petitioner testified at the *coram nobis* proceeding and stated at his sentencing that it was his understanding after speaking to the Judge and his lawyer, that he would not go to jail if he pleaded guilty. The Court has refused to permit him to withdraw his plea of guilty and go to trial.

The petitioner herein, at the time of his sentencing before Judge Corso and at the time of his *coram nobis* before Justice Rinaldi, testified unequivocally that he was brought into the chambers of Justice Brownstein with his own lawyer, without the District Attorney present, at which time he was told that if he pleaded guilty he would not receive jail time if the agreed to make restitution. Julia did agree to make restitution. No amount was specified.

At the time of sentence his trial lawyer was not present before Justice Brownstein, but, rather, his lawyer's father was present.

Justice Brownstein, apparently reacting to the rather traumatic accusations of Mr. Haberman, pronounced a 2½ to 5 year sentence.

In a *coram nobis* proceeding, the petitioner was not permitted to call witnesses, including a Catholic priest, a former Foreign Service officer, and others, who would have corroborated his story.

In addition, he was not permitted to introduce a tape recording of a conversation about this promise with his lawyer.

At the very least, the Court should have permitted Julia to withdraw his plea of guilty. *(Santobello v. New York,* 404 U.S. 257.)

Under the circumstances, petitioner was denied due process of law and this Court should grant certiorari and ultimately direct that petitioner be permitted to withdraw his plea of guilty or, in the alternative, to order that petitioner be permitted to have the promised probationary sentence.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

s/ Irving Anolik
Attorney for Petitioner

APPENDIX

ORDER OF THE NEW YORK COURT OF APPEALS AFFIRMING WITHOUT OPINION

(Filed April 30, 1975)

COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

THOMAS JULIA, JR.,

Appellant.

Order of the Appellate Division, Second Department Affirmed. No opinion.

All concur.

April 30, 1975

Clerk

ORDER OF APPELLATE DIVISION, SECOND DEPARTMENT

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on October 9, 1973.

HON. M. HENRY MARTUSCELLO Acting Presiding Justice

HON. FRANK A. GULOTTA
HON. MARCUS G. CHRIST
HON. ARTHUR D. BRENNAN
HON. A. DAVID BENJAMIN Associate Justices

The People of the State of New York,

Respondent,

v.

Thomas Julia, Jr.

Appellant.

Order on Appeal from Judgment of Conviction

In the above entitled action, the above named Thomas Julia, Jr., defendant in this action, having appealed to this court from a judgment of the Supreme Court, Kings County, rendered October 6, 1972 on resentence; and the said appeal having been

submitted by Irving Anolik, Esq., of counsel for the appellant, and submitted by J. Mitchell Rosenberg, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed; and it is further

ORDERED that pursuant to CPL §460.5, subd. 5, the case is hereby remitted to the Supreme Court, Kings County, which court must, upon at least two days notice to the defendant, his surety, and his attorney, promptly direct the defendant to surrender himself to the said court in order that execution of the judgment be commenced or resumed, and if necessary the said court may issue a bench warrant to secure his appearance.

Enter:

IRVING N. SELKIN

Clerk of the Appellate Division